IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE ANDROGEL ANTITRUST LITIGATION (II)

CASE NO. 1:09-md-2084

DIRECT PURCHASER CLASS ACTIONS

1:09-CV-956-TWT
1:09-CV-957-TWT
1:09-CV-958-TWT
1:09-CV-2913-TWT

DIRECT PURCHASER INDIVIDUAL ACTIONS

1:09-cv-2776-TWT
1:09-cv-3019-TWT

DIRECT PURCHASER PLAINTIFFS' OPPOSITION TO PAR'S AND PADDOCK'S MOTION FOR CLARIFICATION

On February 22, 2010, the Court entered an Order (the "Order") granting in part and denying in part Defendants' motions to dismiss. [D.E. No. 50.] The Court denied Defendants' motions to dismiss the Direct Purchaser Plaintiffs' allegations relating to sham litigation. Order at 16-21. On March 5, 2010, Defendants Par and Paddock ("Par/Paddock") filed a

"Motion for Clarification" contending that the Court's Order dismissed *all* of the Direct Purchasers' claims against the generic Defendants, and asking the Court to "clarify" that the generic Defendants cannot be liable for settling sham litigation by agreeing to stay out of the market. [D.E. No. 51.] The Direct Purchaser Plaintiffs oppose the motion for the following reasons.

In its Order, the Court recognized that the Direct Purchaser Plaintiffs alleged Solvay engaged in sham litigation and that "the generic Defendants conspired to restrain trade by entering into settlements of the sham litigation in exchange for a portion of Solvay's monopoly profits." Order at 16. After discussing Plaintiffs' allegations and the applicable law, the Court held that "[t]he Direct Purchasers have alleged facts that may support a sham litigation theory of recovery. Therefore, the motions to dismiss should be denied." Order at *20. Par/Paddock argue, however, that the sham litigation allegations can only support a claim against Defendant Solvay, the plaintiff in the patent litigation, regardless of their agreement with Solvay to settle that same sham suit in a way that, Plaintiffs allege, was an agreement not to compete.

As the Court explained when addressing the reverse payment allegations, "[g]enerally, when one company agrees to pay a competitor not to compete, the agreement is a per se antitrust violation." *Id*. at *12 (citing

Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294, 1304 (11th Cir. 2003)). The Court stated, however, that under Eleventh Circuit law, analysis of a patent settlement that might otherwise be a *per se* antitrust violation, requires an examination of the scope of the exclusionary potential of the patent. Order at *12 (citing and quoting *Schering-Plough Corp. v. Federal Trade Comm'n*, 402 F.3d 1056, 1065 (11th Cir. 2005)).[1] And, as the Court noted further, "it appears that the Eleventh Circuit's Hatch-Waxman cases allow antitrust Plaintiffs to assert "sham litigation" in the content of reverse payment patent infringement settlements." Order at 16.

As the Court determined in its Order, Plaintiffs have sufficiently alleged that Solvay's patent litigation against Par/Paddock (and Watson) was a sham, and that the generic Defendants became complicit in the antitrust violation when they agreed to settle that sham litigation and not compete in return for a share of Solvay's monopoly profits (*i.e.* reverse payments). Order at 16-21. Once the patent litigation is established as a sham, the shield of the patent is no longer available and Par/Paddock (and Watson) cannot escape antitrust liability for entering into an agreement not to compete in exchange for payments from their competitor Solvay. *See In re Terazosin Hydrochloride Antitrust Litigation*, 352 F. Supp. 2d 1279, 1294-

[1] Plaintiffs are not here trying to reargue their view of Eleventh Circuit law.

1319 (S.D. Fla. 2005) (holding that reverse-payment agreement between brand-name manufacturer and generic competitor was unlawful conspiracy in restraint of trade because it exceeded the exclusionary scope of the relevant patent).

As this Court recognized:

> The Direct Purchasers allege that Solvay engaged in sham litigation in filing and prosecuting the patent infringement actions against the generic Defendants. They allege that *the generic Defendants conspired to restrain trade by entering into settlements of the sham litigation* in exchange for a portion of Solvay's monopoly profits.

Order at *16 (emphasis added). After finding sufficient Plaintiffs' allegation that the Solvay patent suit was a sham, the Court also upheld Plaintiffs' allegation that the generic Defendants "enter[ed] into settlements of the sham litigation" with Solvay "in exchange for a portion of Solvay's monopoly profits." *Id.*

Par/Paddock should not now be able to hide behind the patent settlement shield when Plaintiffs adequately have alleged that the patent litigation itself was a sham and that the generic Defendants participated in an agreement not to compete as part of the settlement of that sham litigation. Plaintiffs respectfully request that the Court deny Par/Paddock's motion for clarification and judgment.

Accordingly, the Generic Defendants remain in the case, and their motion for "clarification" should be rejected.

Dated: March 10, 2010.

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